Supreme Court, U.S.
FILED

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In The
Supreme Court of the United States
October Term 1998

EDWARD EMERY

Petitioner,

v.

CITY OF TOLEDO, et al.

Respondents

Petition for Writ of Certiorari
To the United States Court of
Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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1. QUESTION PRESENTED FOR REVIEW

1. Is it a denial of Petitioner's due process rights to a trial by jury under the Sixth Amendment to the United States Constitution for a Court to enter an order dismissing against Petitioner in circumstances where there are substantial factual issues and the complaint sets forth clear claims

2. One of the main constitutional issues and questions involved in this matter centers around the due process provisions subsumed under the sixth and fourteenth amendments to the United States Constitution, as well as issues involving deprivation and property rights without due process protection under the fifth amendment to the United States Constitution. More specifically, the basic issue is whether dismissal of a legal action challenging and contesting an governmental order requiring rectification or compliance with a building code prevents a subsequent lawsuit that is centered on improper actions of the governmental authority is enforcement of such orders. More specifically, if the basic code section and order seeking enforcement of such housing regulations is upheld in a legal challenge in the Federal or State Court System, does that prior judgment order bar separate legal relief, under the doctrine of res judicata (and/or collateral estoppel) for improper activities of the governmental officials in enforcing such order at a later date. Variously stated, does the due process clause provisions of the United States Constitution protect an individual such as Petitioner from improper acts of governmental officials in the acts of enforcing an order otherwise specifically held by the court to be valid and enforceable. Does the court's imprimitur of validity as to a housing regulation and order as to such individual subsequently protect governmental authorities from abuse and improper actions (exceeding the order enforced).

2. LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Petitioner (Plaintiff) - Edward Emery

Respondent (Defendant) - City of Toledo, Ohio

Respondent (Defendant) - Carlton S. Finkbeiner, (Mayor)

Respondent (Defendant) - Stephen Herwat

Respondent (Defendant) - Robert Burger

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ENFORCEMENT OF THE ORDER
COMPRISE WANTON OR WILLFUL
DISREGARD OF THE ABATEMENT ORDER
CAUSING DAMAGE TO PETITIONER'S
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4. OPINIONS BELOW

(a) Opinion and Order of U.S. District Court (Northern District of Ohio, Western Division), Case No. 3:97 CV 7452 (February 10, 1998) (See Appendix)

(b) Opinion of U.S. Court of Appeals (Sixth Circuit) in Case No., 98-3304, dated April, 1999 (See Appendix)

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EDWARD EMERY

Petitioner,

vs.

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Respondents

On Petition for a Writ of Certiorari

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4. STATEMENT OF JURISDICTION

(A) The date of judgment of the U.S. Court of Appeals (Sixth Circuit) was April 30, 1999

(B) Jurisdiction is based and requested under 28 U.S.C. 1954 (7), and other provisions of the United States Code

5. CONSTITUTIONAL PROVISIONS, STATUTES & RULES INVOLVED

(a) Sixth Amendment to United States Constitution
(See Appendix)

(b) Fifth Amendment to United States Constitution
(See Appendix)

6. STATEMENT OF THE CASE

In this matter, Petitioner Edward Silvio Emery filed a Complaint in the U.S. District Court for the Northern District of Ohio on June 9, 1997, acting pro se. Respondents requested that Petitioner's Complaint be dismissed as vague and unintelligible. Petitioner thereafter retained counsel and subsequently the District Court ordered Petitioner to file an amended complaint more concisely stating the issues. Accordingly, such an amended complaint was filed. Respondents then filed, pursuant to F.R.C.P. 12(b) (6) a motion to dismiss/motion for summary judgment, seeking dismissal of such amended complaint, alleging Petitioner had failed to state a claim upon which relief could be granted. Petitioner, in an attempt to address an issue raised by Respondents at the trial court level, sought to abandon a claim advanced under 42 U.S.C. 1981 and to reassert a claim under 17 U.S.C. Section 106A, and filed a Motion to Amend his Complaint and accordingly a

"Second Amended Complaint" was submitted to the Court. The Magistrate Judge, on February 13, 1998, issued a judgment granting Respondent's Motion to Dismiss, Denying Petitioner's Second Motion to Amend Complaint, and Denying Plaintiff's Motion for Summary Judgment as moot. (Appendix) Petitioner filed a timely Notice of Appeal (Appendix) with the United States Sixth Circuit Court of Appeals. This appeal was denied by the Circuit Court (Appendix p 30).

STATEMENT OF FACTS

This case involves matters centering on governmental housing orders, building permits, and enforcement of same. Specifically, in 1981, Petitioner Edward Emery obtained a valid building permit from the Respondent City of Toledo, Ohio to commence construction of an addition to his residence. Construction commenced using among other materials secured large stones. Petitioner, an artist, conceived and implemented the construction as a stone "castle" addition. Some techniques and architectural designs were adapted from medieval structure. Petitioner had in fact carved ornate decorations into some stones, and also included other inventive decorations and art work in the process.

Then, on or about April 21, 1994, the Respondent City of Toledo, through its department of Health and Environment, cited the Petitioner claiming his property was a nuisance pursuant to Chapter 1726(a)

of the Toledo Municipal Code. This citation ordered that Petitioner

> . . . .Remove concrete slate, slabs, concrete blocks, all wood, windows (storm or otherwise), construction equipment, construction tools, scaffolding, tires and all other junk and debris. Maintain in a nuisance-free condition at all times. T.M.C. 1.26.01(a) (4) Unless you cause the abatement of this public nuisance within seventy-two (72) hours from the date of this notice/order, pursuant to the above order, the public nuisance may be abated by the City of Toledo at your expense . . .

The code provisions under which the citation was filed provides that an appeal can be consummated only by making a personal contact to the Supervisor of the Enforcement Division of Respondent City of Toledo and had to be made within 72 hours of issuance of the order, and accompanied by posting of a $500.00 bond. Such an appeal did not stay the order to abate the nuisance under the Toledo Code.

Therefore, criminal proceedings were filed by the Respondent City of Toledo against Petitioner for violation of the nuisance ordinance. In order to stay such criminal action as violative of his constitutional

rights, Petitioner filed a Complaint in the U.S. District Court, alleging that the Applicable Code Provision was unconstitutional on their face as being ambiguous and vague. The District Court ruled that the statutes were vague, and that any enforcement action would not deprive Petitioner of his right to due process. Petitioner appealed this finding to the U.S. Court of Appeals, where, in Case No. 96-3510, on July 31, 1997, the Circuit Court affirmed the District Court's findings.

Petitioner served a 30 day sentence of incarceration as a result of the concurrent criminal prosecution.

Thereafter, on May 20, 1997, the Respondent City of Toledo issued a notice to Petitioner, indicating that it would itself take steps to abate the nuisance on his property pursuant to the Toledo Municipal Code.

Accordingly on or about May 27 and May 28, 1997, agents of the Respondent City of Toledo and the other named Defendants (Respondents) in the present

case came on Petitioner's property at 2448 Portsmouth, Toledo, Ohio, and consummated in the following:

1. removed a sizable quantity of building stones, some of which were loose, and others of which were integrated in the structure standing on the property;

2. removed a number of valuable stones, some of which were loose, and others of which were part of a structure standing on the property;

3. removed or destroyed free standing and integrated sculptures that Petitioner had painstakingly created;

4. destroyed and removed a flower garden in the front yard of the Petitioner's property, in which Petitioner was cultivating certain decorative and valuable plants which had taken years to grow. This particular garden was not associated with any of the structures or items mentioned in the nuisance determinations or orders, nor covered by such nuisance

abatement order. It was not until Petitioner objected to the other activities of the Respondent's workers, and the nuisances existing on his neighbor's property, that Respondent Herwat made the order to remove the garden. Petitioner contends that the latter order was made on the site and was removed solely as a means of intimidating and harassing him;

5. caused considerable damage to the structure of the main house and driveway, including but not limited to cracking of the foundation and of the driveway and damage to the roof of the house. Petitioner maintained that through the exercise of reasonable care, these damages could have been avoided.

Thereupon, on June 9, 1997, Mr. Emery filed a Complaint in the District Court alleging independent causes of action against Respondent for "Ultra Vires" actions of the Respondent in carrying out the prior order of the Court, (i.e. for matters that were improperly done

in implementing the order that otherwise transcended the basic abatement order of the Court.)

8. SUMMARY OF ARGUMENT

Petitioner argues that the District Court (as affirmed by the Court of Appeals) erred in granting Respondent's Motion to Dismiss, as the Petitioner set forth a number of claims under state and federal law which (1) stated a claim upon which relief can be granted; (2) relate to events which occurred subsequent to the earlier litigation, and involve issues distinct and independent of those which were made or could have been made in the earlier litigation, and; (3) if Petitioner is able to prove the facts alleged this would allow Petitioner to recover against the city and the Respondents in their individual capacities, and overcoming any qualified immunity which may be asserted by Defendants.

Further, Petitioner argues that the District Court erred in denying Petitioner's motion to amend his

complaint to incorporate an additional cause of action which would have been able to overcome a motion to dismiss.

8. ARGUMENT

IT IS A DENIAL OF PETITIONER'S DUE PROCESS RIGHT UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO DENY PETITIONER THE RIGHT TO MAINTAIN A LAWSUIT AGAINST A GOVERNMENTAL ENTITY FOR INDEPENDENT ACTIONS OF THE ENTITY AND ITS AGENTS IN IMPLEMENTING A NUISANCE ABATEMENT ORDER THAT ARISES FROM AN ORDER THAT WAS PREVIOUSLY DETERMINED BY (COURT ORDER TO BE VALID WHERE SUCH ACTIONS OF ENFORCEMENT OF THE ORDER COMPRISE WANTON OR WILLFUL DISREGARD OF THE ABATEMENT ORDER CAUSING DAMAGE TO PETITIONER'S PROPERTY.

As a point of departure, the trial court dismissed Petitioner's case herein on a motion to dismiss filed pursuant to F.R.C.P. 12(b) (6). Petitioner maintains such a dismissal should only be granted when the complaint totally fails to state a viable cause. Meador v. Cabinet for Human Resources, 902 F. 2d 474, 475 (6th Cir 1990) cert. denied 115 S. Ct. 182 (1990). Scheuer v. Rhodes, 94 S. Ct. 1683, 1686 (1974); Conley v. Gibson, 78 S.Ct. 99, 101-102 (1957).

Apparently, the Court's Decision to dismiss was based on two elemental aspects: That the litigation was barred by res judicata by virtue of the previous case, and that the Defendants were able to assert qualified immunity from suit.

In this respect, Petitioner's first amended complaint set forth causes for:

1. The reckless or negligent damaging of his house and driveway;

2. The intentional and malicious removal of his flower garden;

3. The reckless or intentional removal of materials that were not set forth in the nuisance abatement order, which acted to deprive Plaintiff of property without due process of law. These aspects center on acts that occurred independently and separately of the incidents that led to the handling of the nuisance complaint.

Moreover, Petitioner was denied the right to amend and set forth a cause of action for the destruction of his art work in contravention of 17 U.S. C. Section 106A. (The Visual Arts Act.) All of these claims comprised viable causes of action.

Federal and State Law clearly provide that both individuals and municipalities can be held liable for each of the stated claims. See, e.g., Guerrero v. Toledo, 114 Ohio App. 3d 8, 682 N.E. 2d 716 (6th Dist App., 1996); McVey v. Cincinnati, 109 Ohio App. 3d 159, 671 N.Ed 2d 1288 (1st Dist App., 1995). Ohio Revise Code Section 2744.02 (B) (2) states that "Except as otherwise provided in sections 3314.07 and Section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary function of the political subdivisions."

Additionally, under Ohio Law municipal employees are liable for acts made in a reckless or malicious manner. O.R.C. Section 2744.03 (A) (6) (b). This aspect has been particularly applied to nuisance abatement actions. Chalker v. Howland Twp. Trustees (74 Ohio Misc 2d 5, 658 N.E. 2d 335 (Trumbull Comm. Pl. 1995). In Chalker, the court ruled that the actions undertaken to abate a nuisance "must not be reckless and wanton" and that, should it be shown that a nuisance abatement were carried out in a reckless manner that the municipality would be subject to liability in a state tort action. Id. at 74 Ohio Misc. 2d 14. Moreover, a municipality, and its employees, may also be held liable for violations of Federal law. (See)

Moreover, for Petitioner to succeed on a claim under 42 U.S.C. Section 1983, it must be demonstrated that (1) The Defendants' conduct was committed by a person acting under color of state law; and (2) That this conduct deprived Petitions of rights, privileges, or

immunities secured by the Constitution or laws of the United States. See Paratt v. Taylor (1981), 451 U.S. 527, 535, 101 S. Ct. 1938, 1913, 68 L.Ed.2d 420, 428.

First, action which is considered to be misdirected in application of state law by state or local officials is remediable under 42 USC 1983, and is construed to be "state action." Monroe v. Pape (1961), 365 U.S. 167, 81 S. Ct. 473, 5 L.Ed.2d 492. For a viable claim, such misuse of state law must lead to a reckless, wanton, or intentional violation of "rights, privileges, or immunities secured by the Constitution or laws of the United States."

Additionally, federal law grants parties a right to be secure in their property and possessions, which protection is incorporated in the Fifth Amendment to the United States Constitution, and one is not to be deprived of such property without due process of the law (as set out in the Fourteenth Amendment to the United States Constitution.)

Petitioner set forth claims based on the claims that the Respondents engaged in actions which exceeded the scope of the citation issued under the nuisance abatement ordinance. The Nuisance Abatement order, under color of which the demolition of Petitioner's structure and collateral damages occurred to his property simply ordered Petitioner to "Remove concrete slate, slabs, concrete blocks, all wood, windows (storm or otherwise), doors (storm or otherwise) construction equipment, construction tools, scaffolding, tires, and all other junk & debris. Maintain in a nuisance-free condition at all times. T.M.C. 1726.01 (a) (4)." Petitioner argues, however, that there were many materials and objects which were not set forth in the Nuisance Abatement Order, and which a reasonable person, upon perusal, would conclude were not subject to removal. Notwithstanding, Respondents acted to remove the additional items, without a reasonable belief that they were included in the order even over the

explicit protestations of Petitioner. Petitioner maintains that the actions of Respondents deprived him of property that was not in this order, or even reasonably believed to be generally covered, by the abatement order under which Respondents acted. Petitioner claims that Respondents deprived him of his constitutional right not to be deprived of property without due process as subscribed under the fifth and fourteenth amendments to the United States Constitution. In this respect, there is no doubt that Respondent can be held liable in their individual and official capacities for civil rights and other violations committed in the curse of their official duties. See Monell v. Dept. Social Servs., 436 U.S. 658, 690 (1978). Generally, there is no defense to this liability that Defendants acted in good faith under their official capacity. Owen v. City of Independence, 445 U.S. 622 (1980).

Moreover, in order to succeed on an action against a municipality advanced under 42 U.S.C.

Section 1983, one must demonstrate that the municipality has a policy or custom which serves to deprive that person (such as Petitioner) of specified constitutional rights. See Monell v. New York City Dept of Social Serv. (1978), 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed 2d 611. Thus, a municipality or comparable governmental agency can be held liable under Section 1983 for the acts of its employees.

The Courts have ruminated repeatedly to determine ultimately that the purpose of the policy/custom requirement is to contradistinguish actions of a municipality from acts of its employees, as a municipality is only liable for action through its agents (for which the municipality is only liable for actions through to agents for which the municipality is actually responsible). Miller v. Leesburg (1993), 87 Ohio App. 3d 171, 177, 621 N.E.2d 1337, 1341; Pembaur v. Cincinnati (1986), 475 U.S. 469, 106 S. Ct. 1292, 89 L.Ed.2d 452. Accordingly, it is the actual execution of

the government's policy, either by its policy makers or by those agents or employers whose acts may be held to represent official policy which gives rise to municipal liability under Section 1983.

It has been further held that a governmental policy exists where a deliberate choice to follow a course of action from several routes by officials responsible for establishing final policy with respect to a particular area. Pembaur, supra. Such policy need not always be reduced to writing, if it creates a fixed plan of action to be followed under similar circumstances.

Additionally, a single incident or decision may give rise to liability under Section 1983. Pembaur, supra.; Mayes v. Columbus (10th Dist. App., 1995), 105 Ohio App. 3d 728, 664 N.E.2d 1340, reconsideration denied.

In the subject case, Petitioner professed some testimony by way of affidavit, that city officials of the Respondent City of Toledo, specifically that Respondent

Herwat, while acting in his official capacity at the demolition cite, directly instructed workers to engage in demolition of structures not listed in the nuisance abatement order. Petitioner claims that Herwat, as a high level city official with Respondent Toledo, had discretionary authority over actions regarding property inspections, and that his actions and determinations in this situation can reasonably be taken as reflective of official policy of Respondent City of Toledo. Further, his employees on the site of Petitioner's home acted at his direction, they may also be reasonably said to have been implementing official city policy. Thus, Petitioner had set forth cause of action in his amended complaint which could, if proven, subject both the Respondent municipality and the individual Defendants to liability under 42 U.S.C. Section 1983.

Petitioner further argues that the only basis herein that a motion to dismiss could be granted would be under the doctrine of res judicata, or if all Defendants

could assert a defense of immunity to all claims. Petitioner argues that these defenses were not viable in this instance.

As to the issue and defense of res judicata upheld by the trial court and the Court of Appeals, it is an issue of fact or law actually is litigated and determined by a final order, such determination being essential to that judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. See, e.g. Gargallo v. Merrill, Lynch, Pierce, Fenner & Smith, Inc. 918 F. 2d 658, 661 (6th Cir. 1990); Hicks v. De La Cruz, 379 N.E. 2d 776, 777 (Ohio 1977).

Respondents maintained in the prior litigation in the nature of Emery v. City of Toledo, 6th Circuit Court of Appeals Case No. 96-3510 that this latter case precludes litigation of all the issues raised in the subject case. This earlier lawsuit involved a challenge to the constitutionality of Respondent City of Toledo

Municipal Code Section 1726.01 on the grounds that the statute was void for vagueness and that, as such, enforcement of the statute against Petitioner was a violation of his constitutional right to due process. Emery v. Toledo, U.S.D.C.N.D. Ohio Case No. 3:94CV7540, Memorandum Opinion at 2. In this prior case, Petitioner had sought to enjoin the Respondent City of Toledo from acting under the ordinance to abate the alleged nuisance and to enjoin or stay criminal proceedings brought against him under the statute. The District Court in that prior case held that the ordinance was not unconstitutionally void for vagueness, and as such, implementation of the ordinance did not deny Petitioner due process on such grounds. At this point for a base point of departure for the following discussion, Petitioner reiterates the point that the issuance of an order is a distinct (although related) action or evolution from the act of enforcing the

ordinance. This dichotomy is important in the following context.

Some three years or so after the original issuance of the nuisance determination, and after the prior litigation seeking to forestall enforcement in the Sixth Circuit Court of Appeals (with the final order in that case issuing July 31, 1997), Respondents commenced action to demolish Petitioner's addition. In the course of this separate "enforcement" action, Respondents allegedly exceeded the scope of the nuisance abatement order, by removing several large and valuable objects which were not listed, referenced, or otherwise reasonable determinable to have been included in the Nuisance Abatement Order; and (2) Acted recklessly in abating the nuisance, causing considerable damage to Petitioner's main home, driveway, and property all of which could have been avoided (3) destroyed original works of art in contravention of 17 U.S.C. Section 106A or otherwise causing intentional distortion, and

mutilation of Petitioner's visual art work (sculptures, etc.).

In this particular Nuisance Abatement Order (under guise of which the stated damages occurred to Petitioner's property) it ordered Petitioner to "Remove concrete slate, slabs, concrete blocks, all wood, windows (storm or otherwise), doors (storm or otherwise), construction equipment, construction tools, scaffolding, tires, and all other junk & debris. Maintain in a nuisance-free condition at all times. T.M.C. 1726.01 (a) (4)." Nothing in this order referred to demolition of an existing structure or removal and/or destruction of sculptures etc. as forth above.

Petitioner claimed that the Respondents had (in this implementation process) conducted actions that exceeded Respondent's scope of authority provided under the Nuisance citation. Respondents recklessly damaged Petitioner's property and removed objects and structure not determined to be part of the nuisance,

including but not limited to: a sizable quantity of building stones, other valuable stones, sculptures, and a flower garden. The flower garden had absolutely no connection to the Nuisance Order. The collateral damage inflicted to the structure of the main house and the driveway, was not part of the implementation order. These particular claims of petitioner are not based on the legitimacy of the nuisance abatement order, but rather on whether its implementation was carried out in an appropriate manner. They are, as stated, distinct concepts. These specified events arose well after resolution of the prior case referred to above. Petitioner could not be reasonable expected to litigate the new issues (of the events in the implementation process)in the prior court action. The only issues actually litigated and decided in the prior action were the constitutionality of the City Nuisance Ordinance on its face and whether the Respondent's actions up to that point of time had denied Plaintiff a right to due process of law. The

implementation process comprised a distinct series of events in both time and event parameters.

There is no question that Petitioner is now prohibited from a challenge to the constitutionality of T.M.C. Section 1726, but is does not follow that Petitioner as a matter of law is precluded from litigating issues relating to the specific actions taken by Defendants after the conclusion of the earlier lawsuit. The fact that Petition did not succeed in enjoining enforcement of an order does not bar his right to challenge the means and methods by which the order was subsequently carried out, or force him to suffer the indignities and damages caused by deprivation of his rights protected by state, federal, and constitutional law, as happened in this case. The District Court in this case reviewed the Petitioner's contentions that the structures and objects removed and destroyed that were apparently outside the scope of the order. The trial court reviewed photographs submitted with Petitioner's original

Complaint, and dismissed statements in Petitioner's affidavit as being less than credible "due to their self serving nature". The court's analysis of such issues of fact demonstrates that factual issues were present. Under such circumstances, a court should not grant a motion to dismiss.

As the claims raised in the case at hand derive from different actions on the part of Respondent than those previously litigated, and raise numerous issues relating to events which had not taken place at the time of the earlier litigation, they cannot be deemed to be barred by res judicata.

As to the issue of qualified immunity, a municipality can, pursuant to statute, be held liable for its wanton or reckless acts. O.R. C. Section 2744.02 (B) (2). Consequently, state tort claims brought against a municipal corporation not subject to a defense of qualified immunity. Previous cases in Ohio have been brought in this light against municipalities relating to the

propriety of nuisance abatement methods and abatement actions. Chalker v. Howland Twp. Trustees (74 Ohio Misc. 2d 5, 658 N.E. 2d 335 (Trumbull Comm. l. 1995).

Moreover, a municipality is liable for actions of its employees under 42 U.S.C. Section 1983 under circumstances where actions by public employees or officials were part of a plan or policy of the municipality that caused harm. Mayes v. Columbus (10th Dist. App., 1995), 105 Ohio App. 3d 728, 664 N. E. 2d 1340, reconsideration denied; Kentucky v. Graham (1985), 473 U.S. 159, 105 S. Ct. 3099, 87 L. ED.2d 114. In this case, Petitioner has argued that the Respondent's actions in demolishing his property were part of a general plan or policy, and also that the acts of Respondent Herwat on the scene of implementing the order were sufficient in themselves to constitute city policy.

The question of whether a public official can be held personally liable for an allegedly unlawful official

act generally pivots on the "objective legal reasonableness" of the action. Anderson v. Creighton, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987). Qualified immunity "extends to government officials performing discretionary function . . .insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

For a statutory or constitutional right to be "clearly established,"

> the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violated [the] right. This is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful, but it is to say that in the light of preexisting law, the unlawfulness must be apparent. Anderson v. Creighton, 483 U.S. at 640, 107 S.Ct. at 3039.

Thus, in order to overcome a claim of qualified immunity raised in a motion to dismiss one must "allege

sufficient facts which, if proven, would support a finding that the acts committed would constitute a violation of clearly established law." Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 186 L.Ed.2d 411 (1985).

Few rights are as fundamental and clearly established as a person's right not to be deprived of property without due process of law. Respondents are alleged to have caused damage to Plaintiff's property by deliberately exceeding the scope of the order under color of which they carried out their activities. The order is plain on its face, and for the Respondents to cause destruction or removal of items which do not appear on the face of the notice is a clear and unequivocal overreaching of the authority granted therein. By deliberately and grossly exceeding the scope of the order from which they took instruction and derived authority, Respondent knowingly and intentionally violated clearly established rights of the

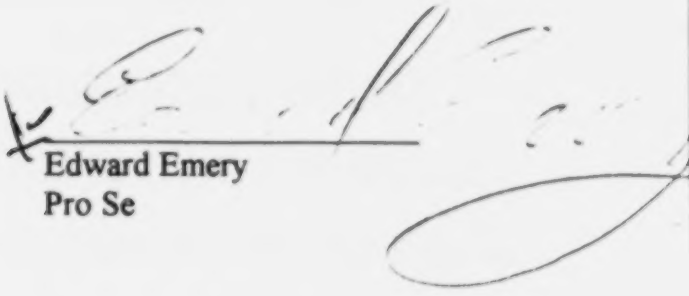
Plaintiff which they must reasonably be expected to have known. Further, Respondent's destruction and removal of items that were not specified in the order created an issue of fact regarding whether such actions were carried out in derogation of Petitioner's constitutional rights.

Petitioner has claimed that items were removed or destroyed intentionally or wantonly and recklessly and this question of qualified immunity, as discussed, above, have been overcome.

CONCLUSION

In conclusion, it is Petitioner's position that he should have been allowed to file an independent action (lawsuit) against Respondents for the separate and distinct tortious and other actions of Respondent City of Toledo and its agents in enforcing the nuisance abatement order inn issue. Petitioner argues that the prior court judgment involving the determination of constitutional validity thereof does not permit any

immunity denies Petitioner his rights of due process and under both the fifth and sixth amendments to the United States Constitution. This aspect brings to light significant concerns of public interest in this constitutional and other perspective.



Edward Emery
Pro Se

7. CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoig Petition was mailed to Barbara Herring, Attorney for Respondent City of Toledo, and Lourdes Santiago, Attorney for Respondents at City of Toledo Law Department, One Government Center, 22nd Floor, Toledo, Ohio 40604 this 25 day of July, 1999.

Edward S. Emery
Pro Se